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Supreme Court, U.S.
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No. 04-450

IN THE

Supreme Court of the United States

PANOS T. TSOLAINOS,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
LOUISIANA COURT OF APPEAL
FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner Tsolainos's conviction by a jury for second degree murder of his exwife was supported by ample evidence, both direct and circumstantial, that he intended to "kill or to inflict great bodily harm" on Deborah Tsolainos. The facts indicated that Tsolainos got into the driver's seat of his girl friend's car parked in the victim's driveway after packing it with their belongings. Connie, the girl friend, was in the process of getting in the passenger side when Tsolainos gunned the motor and caused the car to jerk backwards. It stopped, then the motor was gunned again, the tires squealed, and the car barreled forward throwing Connie out of the vehicle, brushing Clarissa his adult daughter, and throwing her and her little sister Stephanie backwards. The car was steered deliberately into Deborah, hitting her in the middle and throwing her onto the hood. The car moved 50 to 60 feet, then up a tree and landed on its side with Deborah Tsolainos lying underneath the car.

Petitioner claimed it was an accident but the facts at trial did not support either of the two different stories that he told to the police.[1] In fact, prior to this incident, he had been arrested for conspiracy to commit murder. After his initial arrest for conspiracy, he gave a statement to the police admitting that he and Branigan had several conversations during which they agreed to a price and method for the murder of Deborah, his exwife. This statement alone established the existence of a conspiracy. It was introduced at trial. Also introduced at trial was the taped statement between Schmolke and Branigan, at issue in this Writ, when Branigan developed the specifics for murdering Deborah.

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1. At first Tsolainos said that it was the emergency brake. Then he told the police and presented at trial the "control misapplication" theory.

This taped statement was made by co-conspirators during the course and in furtherance of the conspiracy. As a hearsay exception, it was properly admitted into evidence. However, the other contested statement, made by Melissa Tsolainos, defendant's daughter, was not introduced at trial. Melissa's statement was used at a pretrial hearing where the state proved its *prima facie* case of conspiracy. The use of hearsay has always been allowed at pretrial hearings. The pretrial use of this statement is not ripe for consideration by this court because it was not introduced at trial, nor was its substance made known to the jury. The pretrial hearing is not an issue properly presented to this court.

STATEMENT OF PROCEDURE

Petitioner, Panos Tsolainos, was charged by grand jury indictment on August 13, 1998, with the first degree murder of his ex-wife, Deborah Tsolainos, a violation of La. R.S. 14:30. On April 26, 1999, the charge was amended to second degree murder, a violation of La. R.S. 14:30.1. At the sanity hearing on February 9, 1999, the court determined that defendant was competent to stand trial based on the reports of doctors Salcedo and Thompson. On October 11-14, 1999, a twelve person jury was selected. It tried this case on October 15 through 23, 1999 and found petitioner guilty as charged. On April 26, 2000, after the court denied petitioner's motion for a new trial with reasons, it sentenced petitioner to life in prison at hard labor without benefit of parole, probation or suspension of sentence.

Petitioner appealed his conviction and sentence to the First Circuit Court of Appeal which affirmed both by written opinion, *State v. Tsolainos*, 2000-1664 (La. App. 1 Cir. 12/31/03), (unpublished opinion), *rehearing denied.* The

Louisiana Supreme Court denied the writ of certiorari, *State v. Tsolainos*, 2004-0616 (La. 7/2/04), 812 So.2d 645.

The First Circuit considered whether or not it was trial error to allow the state to introduce evidence of other crimes or bad acts. Specifically, the bad acts evidence consisted of the conspiracy evidence of defendant's participation in an alleged conspiracy to murder his ex wife. The First Circuit concluded that there was no trial court error because the state had made a *prima facie* case of conspiracy. The court also found that allowing the recorded conversation between Branigan and Schmolke to be introduced into evidence and played for the jury was not error. Thus, the trial court did not abuse its discretion in denying defendant's motion for mistrial. The court further concluded that the contested statement was a co-conspirator's statement and a firmly rooted hearsay exception that did not violate petitioner's right to confrontation.

Moreover, Mr. Branigan was convicted of conspiracy to commit first degree murder in a separate trial on January 27, 2000. His conviction and sentence were affirmed on direct appeal by the Louisiana First Circuit. *State v. Branigan*, 2000-KH-1589 (La. App. 1 Cir. 2001) (unpublished opinion); *writ denied*, 812 So. 2d 645 (La. 2002). On writ of federal habeas, the U.S. District Court, Eastern District of Louisiana, agreed with the state court that there was sufficient evidence to support the conviction for conspiracy to commit murder. *See Gerald Branigan v. James D. Miller*, No. 02-3325, USDC, E.D. of LA.

STATEMENT OF FACTS

In 1996, petitioner Panos Tsolainos and Deborah Tsolainos separated and began a custody battle for their two minor children and a fight over the community property. They had been married since 1983. Defendant was a wealthy prep school man with an MBA from Wharton College; Deborah was a welder with two children from a previous marriage, Melissa and Clarissa. Panos adopted both of Deborah's two children, and then they had two of their own: Stephen and Stephanie.

During the marriage, while recovering from a back injury, Deborah became addicted to drugs and then heroin. Her addiction to heroin contributed to the break up of the marriage. After the divorce, Deborah went to St. Louis, Missouri, to live with her mother where she entered a recovery program for her heroin addiction.[2] Petitioner was awarded custody of the minor children, Stephanie and Stephen, and occupancy of the family home. Melissa remained in Louisiana with petitioner. Clarissa, who had become pregnant at the time of the divorce, followed her mother to St. Louis where she had her baby. In the meantime, Stephanie and Stephen were in the custody of their father until Deborah was able to successfully complete her drug rehabilitation.

In 1998, Deborah, drug free and sober, petitioned the court for visitation and joint custody as well as for community property.[3] During this time petitioner began using crack cocaine, a fact that was not allowed in evidence after a hearing

2. R. 2159

3. R. 2162

on the issue on October 19, 1999. Petitioner became angry at Deborah's efforts to gain custody of the children and house, and started looking for a hit-man. To accomplish this goal, defendant's adopted daughter, Melissa Tsolainos, introduced him to Gerald Branigan. After Panos discussed killing the victim with Branigan, Branigan contacted Charles "Tinker" Schmolke to assist him in the murder of Deborah Tsolainos.

At the end of June 1998, Charles Schmolke, known as "Tinker," contacted Detective John Scallon regarding a potential conspiracy to kill Deborah Tsolainos by her ex-husband Panos. Tinker agreed to wear a wire and set up a meeting for June 30, 1998, with Gerald Branigan to record the conspiracy to murder Deborah. Tinker met with Branigan and his girl friend, Melody Johnson, and learned that Panos was trying to hire Branigan to kill his ex-wife, Deborah, for five thousand dollars ($5,000.00). Branigan had been introduced to petitioner by Tsolainos's daughter, Melissa Tsolainos. Branigan wished to recruit Tinker to assist in the murder and agreed to give him half of the payment, that is twenty-five hundred dollars ($2,500.00). At that first meeting, it was decided that one of two methods would be used to kill Deborah: (1) an armed robbery where Deborah would be shot between the eyes; or (2) set up an overdose situation with heroin as Deborah was a former addict. Branigan was to get a picture of the victim from Panos for Tinker. This meeting was recorded with a Kell monitor on Tinker while detectives listened. *See* Appendix A.

The second meeting with Branigan occurred during the day on July 1, 1998, when Branigan told Tinker that he had decided that the overdose was the best method. The third meeting was later on that same date. The recording device malfunctioned at both the second and third meetings and the

tapes were blank. The substance of these conversations were not allowed into evidence through Det. Scallon's testimony after a pretrial hearing.

Within a few days, Branigan and Melody Johnson were arrested. Both of them gave statements to the police. Melissa and Panos Tsolainos were also arrested for conspiracy to commit murder. Petitioner gave a statement after his arrest where he admitted his contact with Branigan. After Deborah Tsolainos was notified of the threats and of the arrests, she returned to Louisiana and obtained custody of the children and the house. Petitioner was released on bail on July 17, 1998, after admitting to the conspiracy.

On July 19, 1998, Deborah was cleaning the family home that had been totally trashed by defendant because she had been awarded custody of it by the court. On that Sunday morning, she was helped with cleaning the community home by her daughter Clarissa Tsolainos and Clarissa's friend George DeForest, Aunt Carlotta and her boyfriend Mark, and her two minor children Stephanie and Stephen. Clarissa's baby, Christopher, was also at the house.[4]

During the afternoon, defendant and his girlfriend, Connie DeVille, arrived from Mississippi to pick up some of Connie's personal goods that had been left in the house. Defendant initially remained across the street while Connie went to get her belongings because there was a restraining order forbidding Panos from contacting Deborah or going on the property. The children, Stephanie and Steven, wanted to see their dad so Deborah took them outside and allowed them to go across the street to see him. The atmosphere

4. R. 2168

seemed amiable. Petitioner was allowed to enter the property to help Connie load her stuff into her Skylark, then the two left. Deborah and the kids went back into the house to continue cleaning.

Sometime in the early evening, petitioner and Connie returned to the house for the rest of their personal belongings while the family was eating a McDonald's supper. Clarissa saw petitioner outside of the picture window. When Deborah noticed petitioner she said "Oh f___" and went outside. Clarissa went back to packing and cleaning. While Clarissa and George were inside cleaning the computer room they heard Deborah yelling and tires squealing outside. As they went outside they saw Panos in the car revving up the engine, spinning the wheels while in neutral. Deborah screamed at Panos and pounded on the front of his vehicle. Connie was partly in the car and Panos was revving up the engine. Deborah was yelling "Get off the property" and "You tried to kill me." Clarissa tried to get her mother inside.[5]

In the meantime, Connie was also screaming at petitioner who began backing up the car in a circular motion. Connie fell out of the car passenger door then the car barreled forward again grazing Connie, hitting Clarissa and sending her and Stephanie backwards. The engine was still very loud and the tires were squealing. The car hit Deborah in the middle, threw her in the air.[6] She landed on the hood of the car as the car ran up the tree and landed on its side on top of Deborah crushing her.[7]

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5. R. 2172-75

6. R. 2180

7. R. 2109

George had heard the ruckus and run outside with a baseball bat, but when he saw the victim pinned underneath the car and the kids crying he went to call 911 but Clarissa made the call while George went back outside. He attempted to help Deborah by getting a jack from his car to raise the vehicle off the victim. In the meantime, petitioner climbed out of the car but refused to help when asked by George and he went inside. Petitioner passed Clarissa while she was on the phone and told her that the emergency brake was the problem.[8] He also kept saying "That f-ing bitch got what she deserved, she shouldn't have been running her f___ing mouth." Petitioner said this calmly but with a lot of anger.[9] The police and ambulance arrived and began extricating the victim. Deborah died within three to five minutes after the accident.

REASONS FOR DENYING THE PETITION

A. This Court lacks jurisdiction to determine whether the confrontation clause applies to "testimonial" evidence submitted at pre-trial hearings which form the basis for introducing alleged "inadmissible" evidence at trial.

Respondent urges this Court to deny the instant writ of certiorari based upon this issue because the statement of Melissa Tsolainos was never admitted at trial. The issues on appeal to the State First Circuit Court of Appeal were trial errors which did not include the admission of Melissa's statement at the pre-trial hearing. Melissa's statement at the pre-trial hearing was not assigned as error nor was it briefed

8. R. 2185

9. R. 2111

as required under State law. In Louisiana, issues that are not assigned as error and/or not briefed are considered abandoned on appeal. *State v. Bay*, 529 So. 2d 845 (La. 1988); *State v. Martin*, 550 So. 2d 568 (La. 1989). Petitioner mistakenly refers to the First Circuit Court of Appeal opinion as making reference to Melissa's statement in its final conclusion on the coconspirator's declaration. The First Circuit said, "From our review of this record, we find that the contested statement in the instant case was a coconspirator's statement with referential 'indicia of reliability.'" The "contested statement" clearly refers to the taped statement between Branigan and Tinker that was at issue in the assignment of error. The First Circuit at this point was merely acknowledging and verifying the criteria under *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed .2d 597 (1980), prior to that case's reversal.

Under Article 3 of the United States Constitution, the exercise of federal judicial power depends on the existence of a case or controversy. *Liner v. Jafco*, 375 U.S. 301 (1964). As set forth above, the issue of Melissa Tsolainos statement to the police was not in controversy at the state court level and therefore does not form a case or controversy before this Court. A ruling by this Court would clearly be an advisory opinion or an abstract proposition of law based on a matter that has not been fully litigated in the state court. For these foregoing reasons, respondent respectfully suggests that this Court should not grant this writ based on the first issue.

Nonetheless, this Court should deny this issue on the merits. Melissa's statement to the police was used at the pre-trial hearing to establish the purposes of the pre-trial hearing, whether there was a conspiracy. Hearsay evidence, like Melissa's statement, may also be used to establish probable cause. *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317,

76 L. Ed. 2d 527 (1983). Hearsay is allowed as a res gestae statement, that is a statement made as a spontaneous utterance or declaration within a short period of time before or after the commission of the crime. Hearsay statements are also admitted in pre-trial hearings to show a state of mind regarding the declarant to determine the admissibility of other statements or evidence in a motion to suppress. *State v. Sheppard*, 371 So. 2d 1135 (La. 1979). Moreover, the admission of Melissa's statement at the pre-trial hearing was used to determine the *prima facie* case as allowed under the C.E. Art. 104(A) and *State v. Myers*, 545 So. 2d 981 (La. 1989). Melissa's statement was one of several pieces of evidence used at the hearing to establish a *prima facie* case for a conspiracy. It was not introduced at trial and therefore did not taint the jury or violate defendant's right to confrontation.

In his testimony at trial, Detective Bobby Juge said that he took the taped statement from Panos on July 7, 1998 and also a taped statement from Melissa.[10] Nothing further was said about the substance of Melissa's taped statement.[11] The jury heard the taped statement of defendant made after his arrest on the conspiracy charge. The jury had no further information regarding Melissa's statement to Juge. Therefore, there is nothing for this Court to review. However, if this Court would find that Detective Juge's reference to Melissa's statement was error, it was harmless error in view of the implications of Panos' statement played for the jury. In his statement, Panos Tsolainos, Melissa's father, implicated her

10. Det. Juge also testified that he interviewed Gerald Branigan and Melody Johnson prior to issuing warrants for Panos and Melissa. R. 2377

11. R. 2381

as having introduced him to Branigan for the specific purpose of murdering his ex-wife. Clearly, even if the Detective's neutral reference to Melissa's statement was some sort of error, it was harmless error in light of the evidence at trial. Petitioner presents no viable issue for the Court to review in this Question.

B. The tape-recorded conversation of Mr. Schmolke and Mr. Branigan was statements in furtherance of a conspiracy and under *Crawford* not subject to the Confrontation Clause scrutiny.

Petitioner asks this Court to grant this writ and determine that any statements made in furtherance of a conspiracy that included a police informant, or someone who had contacted the police regarding the conspiracy, should fall within *Crawford's* minimal definition of "testimonial evidence." If this Court extends the definition of *Crawford* to include what defendant terms as ex parte testimony of a police informant who gets paid for results, it will eliminate many co-conspirators' statements as hearsay exceptions and radically change the jurisprudence in this area.

Crawford v. Washington, 124 S. Ct. 1354 (2004), specifically defined the core class of "testimonial" statements. It limited the applicability of the Confrontation Clause to statements constituting "testimony." The definition included both "in court" testimony and its "functional equivalent," such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross examine, and "similar pre-trial statements that the declarants would reasonably expect to be used prosecutorially." *Crawford v. Washington*, *supra.* Statements taken by police officers in the course of interrogations are also testimonial under even

a narrow standard according to *Crawford*. For these aforementioned types of statements to be admissible, the *Crawford* Court made it clear that the declarant must be unavailable to testify and the defendant must have had a prior opportunity to cross examine the declarant. The *Crawford* Court made it clear that it would leave for another day any effort to spell out a comprehensive definition of testimonial. The day has not arrived with this case.

In discussing the principals behind the application of the Confrontation Clause to statements, this Court specifically mentioned two additional kinds of statements that by their nature are not testimony: business records and statements in furtherance of a conspiracy. These types of statements are clearly non-testimonial hearsay and are governed by the state's hearsay statutes.

In this case, the State introduced testimony concerning a prior incident in which the defendant participated in a conspiracy to kill the victim. Charles "Tinker" Schmolke, a confidential informant, contacted Detective Scallan of the St. Tammany Parish Sheriff's Office and divulged that Gerald Branigan had approached him and asked for his assistance in killing someone. According to Schmolke, Branigan was introduced to Tsolainos by Tsolainos' daughter Melissa. Tsolainos was willing to pay someone to kill his ex-wife, Deborah. Schmolke agreed to wear a Kell recording device that could be monitored by Scallan for the next meeting. That afternoon, on June 30, 1998, Schmolke, wired with the Kell device, went to the residence that Branigan shared with his girlfriend Melody Johnson and talked about the details of the conspiracy. The recording made at this meeting is the taped statement played for the jury. There were two more meetings that were not recorded because of technical failure

with the recording devices. Although Scallan was able to hear the conversations of all three meetings, he was only able to record the first meeting. The Judge excluded from introduction at trial any information from the other two meetings that were not recorded.

This recording established that Branigan was to be paid five thousand ($5,000.00) dollars for accomplishing the murder. He agreed to share twenty-five hundred ($2,500.00) of it with Schmolke. The two men would have to travel to St. Louis, Missouri, because the intended victim was a recovering heroin addict living there with her mother. The men agreed that they were going to fake an "O.D." of the intended victim. *See* Appendix A.

This tape-recorded statement is clearly statements in furtherance of a conspiracy and allowable under State law both under C.E. Art. 404B(1) and Art. 801(D)(3)(b). To exclude these statements because the declarant had talked to the police or was labeled a "police informant" would not serve any clear purpose of the Confrontation Clause. The Confrontations Clause's ultimate goal is to insure reliability of evidence as a procedural rather than a substantive guaranty. As this Court said in *Crawford*, the clause reflects a judgment not only about the desirability of reliable evidence but about how reliability can best be determined. The presence of a person that has spoken with the police or is labeled as a police informant does not move the statements into the realm of testimonial evidence. This is not the same sort of situation as a custodial interrogation, a preliminary examination, or a grand jury questioning. The reliability of statements covered by the Confrontation Clause is not enhanced by the inclusion of the taped conversation between Schmolke and Branigan in

the definition of "testimonial evidence" because Schmolke talked to the police and was wired for monitoring and taping.

Respondent urges this Court to continue the jurisprudence and history that states that hearsay statements of coconspirators are sufficiently reliable not to violate the Confrontation Clause under *White v. Illinoise*, 502 U.S. 346, 112 S. Ct. 763 (1992). Hearsay rules and the Confrontation Clause are generally designed to protect similar values. *Bourjaily v. United States*, 483 U.S. 171, 183, 107 S. Ct. 2775 (1987). This court has reiterated that the co-conspirator exception to the hearsay rule is firmly rooted in our jurisprudence. The statement herein, is just such a hearsay exception. Schmolke contacting the police does not change the characterization of the taped statement as co-conspirator statements.

C. This Court does not need to consider whether the Confrontation Clause imposes an absolute bar to a police informant's testimony absent a prior opportunity for cross examination because the testimony at issue is part of a taped statement in furtherance of a conspiracy and not isolated for consideration.

The petitioner in this case asks this Court to make clear that the general reliability exception in *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531 (1980) no longer survives *Crawford*, even as to non-testimonial evidence. In order to do this, the petitioner asks this Court to lift a police informants testimony out of context from the taped conspiracy statement and apply Sixth Amendment analysis to establish a new rule that would absolutely bar that testimony absent prior opportunity for cross-examination.

Mr. Schmolke came to the police with information that Gerald Branigan contacted him and requested that Schmolke participate in a killing for hire instigated by Panos Tsolainos. The "police informant's testimony" referred to in this section by petitioner is the taped conversation that Schmolke had with Branigan after Schmolke contacted the police. This taped conversation was a statement of two people in furtherance of a conspiracy. Schmolke's testimony cannot be isolated. The discussion must center around the taped conversation between Branigan and Schmolke and not just Schmolke's part of the conversation.

In this issue, petitioner attempts to focus the Court's attention on Schmolke alone. Petitioner even makes a personal attack on Mr. Schmolke's character with a litany of negative personality traits, including drug use and reference to a criminal history. Petitioner fails to point out to the Court that the co-conspirator in the statement, Gerald Branigan, was in fact convicted of conspiracy to commit murder. The issue here is the taped statement between Schmolke and Branigan. The analysis for this Court must focus on the entire taped statement itself and not the isolated words of one co-conspirator.

The focus must remain on the conversation between two people, Schmolke and Branigan. The taped statement was a Kell tape that recorded the conversation of Schmolke, Branigan, and Melody Johnson, Branigan's girlfriend, at Johnson's house. The conversation verified that Schmolke was solicited to participate in the conspiracy to kill Deborah Tsolainos.[12] There was ample evidence of acts in furtherance of this conspiracy: an agreement on the price of the killing;

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12. R. 2257

an agreement concerning the method to use; an agreement on a signal for a safe return of Branigan and Schmolke from St. Louis to Louisiana following the homicide; Panos' agreement to provide Branigan and Schmolke a picture of Deborah.

Moreover, petitioner admitted in the taped statement to police after his arrest on the conspiracy charge, that he and Branigan had several conversations during which they established a price and a method for the murder. They also devised a plan to protect the perpetrators from returning to St. Tammany Parish if the plan to make the death appear accidental went awry. As the First Circuit's opinion pointed out, petitioner's statement alone supported the existence of a conspiracy between petitioner and Branigan. Then the recorded conversation between Branigan and Schmolke verified the existence of a conspiracy and presented positive acts in furtherance of that conspiracy.

It must also be noted that when Branigan first contacted Schmolke to help him kill Deborah, Schmolke was not acting as a state agent and not a police informant at that time. It was Schmolke who went to the police not the reverse. Schmolke's statements made on the Kell tape cannot be isolated in order to make new law or expand the definition of "testimonial evidence." This Court should not isolate one side of a conversation in order to establish new parameters for the Confrontation Clause.

This recorded statement must be analyzed as a whole without isolating the individuals. It is clearly a statement of coconspirators that resides outside of the parameters of *Crawford* and not included in the definition of "testimonial evidence". This writ should not be granted for this issue.

D. This Court should not extend the Confrontation Clause to statements in furtherance of a conspiracy, now admissible under C.E. Art. 801(D)(3)(b), to exclude them from trial if they cannot pass a reliability test and be subject to cross examination.

In this issue, petitioner is asking the Court to extend the Confrontation Clause to statements of coconspirators and apply a reliability test. Petitioner proposes that after a determination is made that a coconspirator's testimony is admissible as a firmly rooted hearsay exception, it should then be tested for its inherent reliability and only be admitted with cross-examination. Petitioner asks this Court to return to its concerns in *Crawford* and add a second test to look at the subjective indicia of reliability that he claims would overcome any presumption of reliability generally afforded by a firmly rooted hearsay exceptions. Thus, petitioner wants this Court to reestablish a test relevant to reliability as denounced in *Crawford*.

Petitioner erroneously claims that the State's evidence of the conspiracy in this case was dependent entirely on Branigan/Schmolke tape recorded conversation. However, Petitioner's own statement after his arrest for conspiracy to commit murder corroborated Branigan's assertions to Schmolke that Panos solicited him to kill Deborah Tsolainos. Branigan's solicitation of Schmolke to assist him in the murder was another "overt act" necessary for the furtherance of the conspiracy. Conspiracies are made up of statements of coconspirators. A *prima facie* case of conspiracy is presented when the State introduces evidence which, if unrebutted, would be sufficient to establish facts of a conspiracy. *State v. Lobato*, 603 So. 2d 739 (La. 1992). Moreover, the statements made by coconspirators which are the object of

defense counsel's hearsay objections are considered by the trial court in making its determination as to whether a *prima facie* case of conspiracy has been established. *Prima facie* cases are generally made using hearsay statements by witnesses and/or coconspirators.

Moreover, *Bourjaily v. United States*, supra, reiterated the bootstrapping rule of *Glasser v. United States*, 315 U.S. 60 (1942) and *United States v. Nixon*, 418 U.S. 683 which established that in determining preliminary questions concerning admissibility, the Court is not bound by the rules of evidence, thus, authorizing consideration of hearsay. The *Bourjaily* court rejected a per se rule barring the consideration of coconspirator statements during preliminary fact finding and stated that such a rule was not required. Like the statements in *Bourjaily*, the coconspirator statements in the tape-recorded statements here were verified by other events that transpired in the meetings that culminated with the arrest of Panos, Branigan, and Melissa for conspiracy to commit murder. Furthermore, the *Bourjaily* court reiterated the jurisprudence that if the statements are admissible under the federal rule of evidence, Rule 801(d)(2)(E), there is no constitutional problem.

In this issue, petitioner wants the Court to eliminate a hearsay exception that covers statements that by their very nature are not testimonial. *Crawford* said that these particular hearsay exceptions were not testimonial evidence and not subject to the Sixth Amendment Confrontation Clause. Petitioner is asking this Court to back out on its holding in *Crawford* and redefine statements by co-conspirators.

Petitioner also continues to return to the First Circuit's statement that said, "From our review of this record, we find

that the contested statement in the instant case was a coconspirator's statement with the referential 'indicia of reliability.' Thus, its admission into evidence was not a violation of the confrontation clause." Petitioner wants this Court to grant the writ because of the First Circuit's reference to "indicia of reliability." The statement was acknowledged by the First Circuit as a coconspirator statement that is firmly rooted as a hearsay exception. The additional comments by the First Circuit that refer to the "indicia of reliability" do not affect the character of the coconspirator's statements themselves. Because this opinion was written prior to the decision in *Crawford*, the Court, in an abundance of caution, referred to the reliability test in *Ohio v. Roberts.* Nonetheless, the character of the statement is not changed by the comments of the First Circuit Court of Appeal. This issue does not provide the Court a reason to grant this writ.

CONCLUSION

It is not necessary for the Court to grant this petition for writ of certiorari, nor is the alternative, plenary review, necessary. The Louisiana Court of Appeal for the First Circuit opinion more than adequately covers the issues raised by this writ and its opinion, even in light of *Crawford,* can be maintained under constitutional scrutiny.

Respectfully submitted,

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